Moreover, such cases often involve applications of the former statute where, as in Petitioner's case, the basis for asserting federal jurisdiction is tenuous at best, and the policy justifications for federal prosecution of purely intrastate criminal activity are non-existent. For example, this issue is currently in play in a high profile prosecution under the former version of § 1958 within the Eleventh Circuit, involving the murder of a Georgia sheriff-elect by several hit men (all acquitted in a state prosecution), who made several calls to one another while within the State of Georgia using cellular phones. *See* Bill Torpy, "U.S. Opens Trial in Derwin Brown's Killing," The Atlanta Journal-Constitution (July 11, 2005), http://www.ajc.com/metro/content/metro/dekalb/0705/11trial.html.

Respondent's second argument, that Petitioner's case is an inappropriate vehicle for the resolution of the question presented because the court of appeals would have affirmed his conviction under either construction of the statute, (Resp. 18-19), misstates Petitioner's question as presented. Petitioner clearly articulated the broader question of whether that interstate use "required a showing that a facility was actually used in interstate commerce in a manner involving more than a purely incidental or inadvertent crossing of State borders." (Pet. i; *see also* Pet. 27.)

CONCLUSION

For the reasons set forth in Petitioner's first issue, this Court should grant his petition for certiorari, vacate the decision below, and remand for further proceedings in light of *Booker*. In the alternative, this Court should grant his petition for certiorari and resolve the increasingly important question of the validity of the Eleventh Circuit's procedure in

Booker appeals. For the reasons set forth in Petitioner's second issue, this Court should grant his petition for writ of certiorari to resolve the conflict in the circuits as to the requisite showing as to interstate commerce under the former 18 U.S.C. § 1958.

Respectfully submitted,

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In the Supreme Court of the United States

CARL M. DRURY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER FOR REHEARING

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Petitioner hereby moves for rehearing on his petition for a writ of certiorari, pursuant to Rule 44 of the Supreme Court Rules. Intervening decisions demonstrate that the Eleventh Circuit Court of Appeals continues to be in conflict with nearly all other circuit courts of appeals by refusing to apply this Court's holdings in *Blakely v. Washington*, 530 U.S. ___, 124 S.Ct. 2531, 2536 (2004) and *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). The district court here sentenced Petitioner under the mandatory application of the Federal Sentencing Guidelines in violation of the Sixth Amendment to the Constitution. The Eleventh Circuit affirmed the sentence without applying *Booker*. Because *Booker* applies to all cases on direct review, *Booker*, at 769, this Court should grant the petition for rehearing, vacate the judgment and remand the case to the Eleventh Circuit for further consideration in light of *Booker*. In short, Petitioner has never had his case reviewed for error pursuant to *Booker*.

REASONS FOR GRANTING THE PETITION FOR REHEARING

1. **Whether the Eleventh Circuit's Rule that Issues Not Raised in the Initial Brief are Forever Forfeited Is Contrary to this Court's Decision in *United States v. Booker* and the Position of Other Circuits, where the District Court and the Court of Appeals Applied Mandatory Guidelines pre-*Booker***

The Eleventh Circuit Court of Appeals, since this Court's denial of Petitioner's Petition for a Writ of Certiorari, continues to apply its "prudential rule that issues and contentions not timely raised in the briefs are deemed abandoned," *United States v. Dockery*, 401 F.3d 1261, 1262-63 (11th Cir. 2005) (quoting *United States v. Ardley,* 242 F.3d 989, 990 (11th Cir.), *cert. denied,* 533 U.S. 962 (2001)). Therefore, the Eleventh Circuit refuses to consider challenges based upon the Sixth Amendment or the advisory nature of the United States Sentencing Guidelines ("Guidelines") to sentences imposed contrary to this Court's holdings in *Blakely v. Washington*, 530 U.S. ___, 124 S.Ct. 2531, 2536 (2004) and *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). In the case of certain defendants, such as Petitioner, whose cases are pending on direct review or not yet final, those defendants, therefore have never had have their cases reviewed for a violation of the Sixth Amendment, or Booker. *See United States v. Baxter*, No. 02-60200, 2005 WL 2605403, at *1 (11th Cir. Oct. 14, 2005) (per curiam); *United States v. Alexis*, No. 02-00094, 2005 WL 2572391, at *1 (11th Cir. Oct. 13, 2005) (per curiam); *United States v. Barona*, No. 04-20710, 2005 WL 2471016, at *2 n. 2 (11th Cir. Oct. 7, 2005) (per curiam). As recognized by Eleventh Circuit Judge Tjoflat, the Eleventh Circuit's application of this issues-not-briefed-are-waived procedural bar

or default rule is "squarely in conflict" with the handling of *Blakely* and *Booker* claims for similarly situated defendants by nearly every other circuit in the country. *United States v. Higdon*, 418 F.3d 1136, 1145 (11th Cir. 2005) (Tjoflat, J., dissenting from denial of rehearing en banc).

The Second, Fourth, Fifth and Tenth Circuit Courts of Appeals have continued to consider *Blakely* and *Booker* claims in cases where a defendant's case was pending on direct review or not yet final when this Court issued its decisions in *Blakely* and *Booker*, but where the defendant filed an initial or opening brief on appeal prior to the issuance of those decisions, or otherwise failed to include a Sixth Amendment or advisory Guidelines challenge to his or her sentence in the initial brief. *See United States v. Valdez*, No. 04-3811, 2005 WL 2447942, at *4, *8 (2d Cir. Oct. 5, 2005) (holding that remand to district court pursuant to *Booker* to consider whether it would have imposed materially different sentence was appropriate, despite fact that defendant did not assert that his sentence violated the Sixth Amendment on appeal); *United States v. Campbell*, No. 03-4547, 2005 WL 2596901, at *1, *2 (4th Cir. Oct. 13, 2005) (per curiam) (vacating defendant's sentence and remanding for resentencing where defendant raised *Blakely* on petition for rehearing); *United States v. Vasquez-Alejos*, 144 Fed.Appx. 441, **1 (5th Cir. 2005) (per curiam) (reviewing defendant's argument pursuant to *Blakely* for plain error where argument was raised for the first time on remand from the Supreme Court and remanding for resentencing); *United States v. Serrata*, Nos. 03-2011, 03-2012, 03-2019, 03-2036, 2005 WL 2462130, at *26, *32 (10th Cir. Oct. 6, 2005) (per curiam) (applying holdings of *Blakely* and *Booker* to defendants who raised *Blakely* in supplemental brief on appeal, vacating sentences and remanding for resentencing). The Third, Sixth, Seventh and Ninth Circuit Courts of Appeals have also applied *Blakely* and *Booker* to cases where a claim was not raised in the initial brief,

since the filing of Petitioner's Reply Brief,. *See United States v. Miller*, 417 F.3d 358, 361, 363 (3d Cir. 2005) (vacating defendant's sentence and remanding for resentencing where *Blakely* was decided after Court of Appeals had affirmed defendant's sentence); *United States v. Jock*, No. 03-6354, 2005 WL 2173822, at *3, *4 (6th Cir. Sep. 8, 2005) (reviewing defendant's sentencing claims for plain error and remanding for resentencing where *Booker* was decided after defendant was sentenced and while his case was on appeal, vacating sentence and remanding for resentencing); *United States v. Townsend*, 419 F.3d 663, 665 (7th Cir. 2005) (ordering limited remand for sentencing court to determine whether it would have imposed the same sentence under *Booker* had it known that the Federal Sentencing Guidelines were advisory, where defendant raised Booker in supplemental brief on appeal); *United States v. Beck*, 418 F.3d 1008, 1016 (9th Cir. 2005) (remanding defendant's case to district court to determine whether court would impose same sentence, despite the fact that defendant did not initially raise *Booker* issue on appeal).

The Eleventh Circuit's persistent and imprudent use of the procedural bar rule to avoid application of this Court's holdings in *Blakely* and *Booker* in cases pending on direct review or not yet final constitutes an aberrant response to the remedial majority's direction in *Booker* that both the constitutional and remedial holdings be applied "to all cases on direct review." 125 S.Ct. at 769 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993)), and stands in direct conflict with the practice of other courts of appeals.

In addition, the Eleventh Circuit's refusal to consider *Blakely* or *Booker* challenges has resulted in divisions within the Circuit itself. Eleventh Circuit Judge Tjoflat, in his

dissenting and specially concurring opinions in *Ardley*, 242 F.3d 989 (Tjoflat, J., dissenting from denial of rehearing en banc); *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc); *United States v. Vanorden*, 414 F.3d 1321, 1324 (11th Cir. 2005) (Tjoflat, J., specially concurring) and *United States v. Higdon*, 418 F.3d 1136, 1145 (11th Cir. 2005) (Tjoflat, J., dissenting from denial of rehearing en banc) has criticized the procedural default rule as a "strange, bad rule," *Vanorden* at 1324, and that "[h]opefully [the Eleventh Circuit] sitting en banc, or the Supreme Court, will soon correct this practice," *id.* at 1328. Eleventh Circuit Judge Barkett has also expressed disagreement with the rule. *See Levy*, 391 F.3d 1327 (Barkett, J., dissenting from denial of rehearing en banc).

Since the filing of Petitioner's Reply Brief, Judge Tjoflat and Judge Barkett have been joined in their criticism of the rule by Eleventh Circuit Judge Hill in *United States v. Bordon*, 421 F.3d 1202 (11th Cir. 2005) (per curiam) (Hill, J., concurring). In an unenthusiastic concurrence from the panel's affirmance of the defendants' convictions, in which it had declined (in a footnote) to consider the defendants' *Booker* claim, which had been raised in a notice of supplemental authority pursuant to Federal Rule of Appellate Procedure 28(j), Judge Hill observed that the Eleventh Circuit's procedural bar rule meant that the defendants "should have claimed relief under *Booker*—before *Booker* was decided!" *Id.* at 1208. Voicing his regret over this precedent, Judge Hill stated "I should like to think that a court would want to correct an erroneous sentence of incarceration—if an efficient and prudential method could be devised to do so. We must feel that we cannot. Yet, the other circuits in this country seem to be doing so—and surviving!" *Id.* Judge Hill concluded that "*Stare decisis* is an important doctrine. But I

trust that, from time to time, it might be tempered with *fiat justitia ruat coelum*."1 *Id.* at 1209.

In addition, Judge Tjoflat has persevered in his criticism of the Eleventh Circuit's continued refusal to consider *Blakely* or *Booker* challenges pursuant to its procedural bar rule since the filing of Petitioner's Reply Brief and this Court's denial of his Petition for a Writ of Certiorari. *See United States v. Meilleur*, No. 03-60111, 2005 WL 2185864, at *1 (11th Cir. Sep. 9, 2005) (Tjoflat, J., specially concurring) (where panel applied rule that issues not raised in briefs are deemed abandoned to defendant who raised *Blakely* claim in Rule 28(j) letter, stating that *Ardley* "was wrongly decided and that we should entertain supplemental briefs on *Booker*'s application in this case") (citing *Higdon*, 418 F.3d 1136); *United States v. Garcia*, 144 Fed.Appx. 848, at **1 (11th Cir. 2005) (Tjoflat, J., specially concurring) (reinstating previous opinion affirming conviction where the "first time [the defendant] raised any *Booker*-related issue in any court was in his certiorari petition to the Supreme Court"); *United States v. Gray*, No. 04-11076, 2005 WL 2237698, at *1, *2 (11th Cir. Sep. 15, 2005) (per curiam) (Tjoflat, J., specially concurring) (same, where defendant challenged constitutionality of her sentence under *Blakely* for the first time in her reply brief); *United States v. Billingslea*, 144 Fed.Appx. 98, 99 (11th Cir. 2005) (per curiam) (Tjoflat, J., specially concurring) (same, where defendant failed to raise a constitutional challenge to his sentence or a challenge under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) in his initial brief); *United States v. De La Ossa*, No. 03-20834, 2005 WL 2277442 (11th Cir. Sep. 20, 2005) (per curiam) (Tjoflat, J., specially concurring) (same, where the defendant raised no objection based upon *Apprendi* before Court of Appeals); *United States v. McCombs*, No. 03-00055, 2005 WL 2298271,

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1 "Let justice be done though the heavens will fall."

at *1 (11th Cir. Sep. 22, 2005) (per curiam) (Tjoflat, J., specially concurring) (same, where defendant first raised a constitutional sentencing error in his petition for rehearing en banc); *Alexis*, 2005 WL 2572391 at *1 (Tjoflat, J., specially concurring) (same, where defendant presented arguments concerning *Blakely* in supplemental brief); *Baxter*, 2005 WL 2605403 at *1 (Tjoflat, J., specially concurring) (same, where the defendant asserted no error based upon *Apprendi*).

Through its use of the procedural default rule in cases of *Booker* error pending on direct review or not yet final, the Eleventh Circuit has imposed an additional requirement and narrows the class of defendants who may benefit from the retroactive application of this Court's new rule of criminal procedure announced in *Blakely* and *Booker*, contrary to this Court's holding in *Griffith* and the approach of nearly every other circuit, resulting in inevitable sentencing disparities. *See Ardley*, 273 F.3d at 999 (Tjoflat, J., dissenting from denial of rehearing en banc); 418 F.3d at 1150 (Tjoflat, J., dissenting from denial of rehearing en banc). Furthermore, merely by failing to raise sentencing error, defendants such as Petitioner have not waived any right to challenge such error, since waiver is the "intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also* Fed.R.Crim.P. 52(b). In addition, prior to this Court's decision in *Blakely*, *Apprendi*-based challenges to sentencing determinations had been completely ruled out by the Eleventh Circuit. *See United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001). The Eleventh Circuit's bad rule will also force criminal appellants in the circuit to anticipate future new rules by raising any and all claims, no matter how frivolous they may be. *See Vanorden*, 414 F.3d at 1324 (Tjoflat, J., specially concurring). In Petitioner's case, "'[t]he fact remains that a sentence has yet to be imposed under a regime in which